Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

(18)

NO. 04-1152

In The
Supreme Court of the United States

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND ALLIANCE DEFENSE FUND IN SUPPORT OF NEITHER PARTY

Gregory S. Baylor *(Counsel of Record)*
Steven H. Aden
CENTER FOR LAW & RELIGIOUS FREEDOM
OF THE CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
Tel.: (703) 642-1070

Counsel for Amici Curiae

July 18, 2005

QUESTIONS PRESENTED FOR REVIEW

The Solomon Amendment, 10 U.S.C. 983(b)(1), withholds specified federal funds from institutions of higher education that deny military recruiters the same access to campuses and students that they provide to other employers. The question presented is whether the court of appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENTS OF INTEREST OF *AMICI CURIAE* AND INTRODUCTION 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE COURT OF APPEALS ORDERED THE DISTRICT COURT TO ENJOIN APPLICATION OF THE SOLOMON AMENDMENT NOT ONLY TO PRIVATE LAW SCHOOLS, BUT ALSO TO PUBLIC LAW SCHOOLS 2

II. CONFERRING EXPRESSIVE ASSOCIATION RIGHTS UPON PUBLIC LAW SCHOOLS WILL UNDERMINE GENUINE FIRST AMENDMENT VALUES 5

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 2

Alpha Iota Omega Christian Fraternity v. Moeser, M.D.N.C. No. 1:04-cv-00765 13

American Civil Liberties Union of Virginia, Inc. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970) 7

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 9

Christian Legal Society Chapter at Arizona State University College of Law v. Crow, D. Ariz. No. 2:04-cv-02572 13

Christian Legal Society Chapter of the Ohio State University v. Holbrook, S.D. of Ohio No. 2:04-cv-197 12

Christian Legal Society Chapter at Southern Illinois University School of Law v. Walker, S.D. Ill. No. 4:05-cv-04070 13

Christian Legal Society Chapter of University of California, Hastings College of Law v. Kane, N.D. Cal. No. 3:04-cv-04484 13

Christian Legal Society Chapter of the University of Toledo v. Johnson, N.D. Ohio No. 3:05-cv-07126 12

Christian Legal Society Chapter of Washburn University School of Law v. Farley, D. Kan. No. 5:04-cv-04120 13

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 2

Dale v. Boy Scouts of America, 530 U.S. 640 (2000) 2

DiscipleMakers v. Spanier, M.D. Pa. No. 4:04-cv-02229 13

Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2 269, (D. NJ. 2003) 3

Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 390 F. 3rd 219 (3rd Cir. 2004) ..... *passim*

Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) 11

Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1558 (M.D. Ala. 1996) 11

Gay and Lesbian Students Association v. Gohn, 850 F.2d 361 (8th Cir. 1988) 11

Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977) 11

Gay Student Services v. Texas A&M University, 737 F.2d 1317 (5th Cir. 1984) 11

Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974) 11

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 1, 10

Healy v. James, 408 U.S. 169 (1972) 7

Hudson v. Harris, 478 F.2d 244 (10th Cir. 1973) 7

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 9

Maranatha Christian Fellowship v. Regents of the Board of Regents of the University of Minnesota System, D. Minn. No. 0:03-cv-05618 ..... 12, 13

Mitchell v. Helms, 530 U.S. 793 (2000) 2

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 2

Rosenberger v. Rector of the University of Virginia, 515 U.S. 819 (1995) 9, 10

Student Coalition for Gay Rights v. Austin Peay State University 477 F. Supp. 1267 (M.D. Tenn. 1979) 11

Troxel v. Granville, 530 U.S. 57 (2000) 3

University of Southern Mississippi. Chapter of the Mississippi Civil Liberties Union v. University of Southern Mississippi, 452 F2d 564 (5th Cir. 1971) 8

Vacco v. Quill, 521 U.S. 793 (1997) 3

Washington v. Glucksberg, 521 U.S. 702 (1997) 3

Widman v. Vincent, 454 U.S. 263 (1981) 9

CONSTITUTIONAL AND STATUTORY PROVISIONS

1 U.S.C. § 7 16

28 U.S.C. § 1738C 16

42 U.S.C. § 2000e(j)..... 12

42 U.S.C. §2000e-2(a)(1)..... 15

OTHER AUTHORITIES

FAIR Participating Law Schools (Georgetown University Law Center, Washington, DC), http://www.law.georgetown.edu/solomon/participating_schools.htm..... 4

By-Laws of Forum for Academic and Institutional Rights, Inc. (Georgetown University Law Center, Washington, DC), http://www.law.georgetown.edu/solomon/documents/FAIRbylaws.pdf..... 4

DOMA Watch: your legal source for Defense of Marriage Acts information (Alliance Defense Fund, Scottsdale, AZ), http://www.domawatch.org/stateissues/index.html 16

Forum for Academic and Institutional Rights (FAIR): Questions & Answers About The Solomon Amendment Litigation (Georgetown University Law Center, Washington, DC), http://www.law.georgetown.edu/solomon/documents/FAIRQandA.doc..... 4

Frequently Asked Questions About the Third Circuit's Decision in the Solomon Amendment Case (*FAIR v. Rumsfeld*) (Heller Ehrman White & McAuliffe, Georgetown University Law Center, Washington DC), http://www.law.georgetown.edu/solomon/documents/FAIRvRumsfeldQA.pdf..... 5

State Laws Banning Marriage Between Same-Sex Couples

(Lambda Legal Defense and Education Fund, New York, NY) http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1254 16

Statewide Anti-Discrimination Laws & Policies (Human Rights Campaign, Washington, DC) http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821 ..... 15, 16

Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation (Lambda Legal Defense and Education Fund, New York, NY) http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217 16

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF *AMICI CURIAE* INTEREST AND INTRODUCTION[1]

The **Christian Legal Society** ("CLS"), founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and many law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, including the rights of religious persons on the campuses of public colleges and universities.

Alliance Defense Fund ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who have First Amendment rights on the campuses of public law schools, universities, and elsewhere. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools,* 533

---

[1] *Amici curiae* file this brief by consent of the parties, and copies of the letters of consent are on file with the Clerk of the Court. Counsel for *amici* authored this brief in its entirety. No person or entity, other than the a*mici*, their supporters, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

SUMMARY OF ARGUMENT

Conspicuously absent from both the district court and appellate court's analyses of the First Amendment claims presented by Respondents is a consideration of whether and to what extent the rights of free speech and association are possessed by Respondent's members that are public educational institutions. The Court's *amici* believe that whatever the constitutional status of the Solomon Amendment may be with respect to private law schools, the analysis changes considerably when its application to public law schools is considered. This is particularly true in view of the status of public educational institutions as "marketplaces of ideas" that include numerous diverse individuals and associations whose rights of speech and association – including the right to express views contrary to those of their schools' official policies – are also subject to constitutional protection.

ARGUMENT

I. THE COURT OF APPEALS ORDERED THE DISTRICT COURT TO ENJOIN APPLICATION OF THE SOLOMON AMENDMENT NOT ONLY TO PRIVATE LAW SCHOOLS, BUT ALSO TO PUBLIC LAW SCHOOLS.

Challenging the Solomon Amendment in this case are the Forum for Academic and Institutional Rights (FAIR), the

Society of American Law Teachers (SALT), an association of students at Boston College Law School, an association of students at Rutgers Law School, three Rutgers law students, and two law professors.

FAIR, an association of law schools and law school faculties is the only plaintiff whose claims are before this Court. More precisely, as demonstrated below, only the claims of FAIR's *law school* members are before this Court.

In the district court, the government moved to dismiss the complaint on the ground that none of the plaintiffs had standing. *See Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F.Supp.2d 269, 276 (D. N.J. 2003). The district court denied that motion, concluding that all the plaintiffs – both the associational and individual plaintiffs – had standing to sue. *See id.* at 296. On appeal, the government conceded that FAIR had standing, and the Court of Appeals – fulfilling its obligation to confirm subject matter jurisdiction – agreed with the district court's assessment of FAIR's standing. *See Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 228, n. 7 (3rd Cir. 2004). The government did *not* concede that plaintiffs other than FAIR had standing, and the Court of Appeals did not examine their standing, concluding that the presence of at least one plaintiff with standing satisfied Article III. *See id.*

Just as the Third Circuit's standing inquiry did not reach the non-FAIR plaintiffs, its substantive First Amendment analysis did not independently consider the constitutional interests of individual law professors (participating in the case either through SALT or as individual plaintiffs) or of individual law students (either through the Rutgers association, the Boston College association, or as individual plaintiffs). Nor did it assess the constitutional rights of law school faculties in

their collective capacities (a number of which are members of FAIR). Instead, the Court of Appeals' analysis focused exclusively on the rights of law schools.

Among FAIR's members are public law schools. FAIR's website states that its membership includes six public institutions.[2] FAIR's by-laws do not limit membership to private schools, instead declaring that "[m]embership in the corporation is reserved for academic institutions (including, but not limited to, universities and colleges) and faculties of such institutions acting as a separate entity."[3] Other documents on FAIR's website confirm that public institutions are among its members. For example, in a document entitled "Questions & Answers About The Solomon Amendment Litigation," FAIR addresses whether the public nature of some law schools might change the constitutional analysis.[4]

The membership of six public law schools in FAIR is not the sole means by which public educational institutions are involved in and affected by this litigation. The plaintiffs asked the district court to declare that the Solomon Amendment violates the Constitution and to enjoin its enforcement.[5] The complaint seeks relief not only for the named plaintiffs and, in the case of associational plaintiffs, their members, but also for every educational institution subject to the Solomon Amendment. In addition, the secrecy of FAIR's membership list is consistent with the plaintiffs' desire for – and the Third Circuit's apparent requirement of – a blanket injunction.

The Third Circuit's disposition of the case almost certainly was intended to provide for the broad relief the plaintiffs sought. The Court of Appeals declared, "[w]e reverse and remand for the District Court to enter a preliminary injunction against enforcement of the Solomon Amendment."[6] 390 F.3d at 246. The Court of Appeals did *not* instruct the district court to limit the effect of its injunction to private law schools. The plaintiffs' attorneys agreed with this interpretation of the appeals court's instructions. In a "Questions and Answers" document on the FAIR website, they declare, "[w]e strongly believe that the injunction will be national in scope, *i.e.*, that it will protect every law school in the United States."[7]

At no point in this litigation have the parties or the lower courts turned their attention to the special questions raised by the presence of public law schools in this case. The *amici* believe that the governmental character of many of America's law schools is relevant to this Court's analysis.

II. Conferring Expressive Association Rights Upon Public Law Schools Will Undermine Genuine First Amendment Values.

---

[2] *See* http://www.law.georgetown.edu/solomon/participating_schools.htm (last visited July 13, 2005).

[3] *See* http://www.law.georgetown.edu/solomon/documents/FAIRbylaws.pdf (last visited July 13, 2005), Art. I, § 2.

[4] *See* http://www.law.georgetown.edu/solomon/documents/FAIRQandA.doc (last visited July 14, 2005).

[5] *See* Plaintiffs' Second Amended Complaint, pp. 25-26.

[6] The Court of Appeals stayed the mandate pending this Court's consideration of this case. Therefore, the district court did not have an opportunity to execute the Third Circuit's instructions.

[7] *See* "Frequently Asked Questions About the Third Circuit's Decision in the Solomon Amendment Case (*FAIR v. Rumsfeld*)," Heller Ehrman White & McAuliffe, LLP, http://www.law.georgetown.edu/solomon/documents/FAIRvRumsfeldQA.pdf (last visited July 14, 2005).

FAIR contends that facilitating the recruitment efforts of the military – an employer that takes sexual conduct and orientation into account – undermines the ability of its members to communicate their disapproval of such employment practices to their students. Its members, which include six public law schools, claim that the First Amendment's Free Speech Clause shields them from congressional pressure to facilitate such recruitment efforts. *Public* educational institutions are claiming a free speech *right* to exclude speakers whose messages and practices they find disagreeable. *Public* law schools are claiming a constitutional *entitlement* to inculcate their students with their chosen perspective on a controversial political and moral question, and to do so by excluding others having a different view.

To be sure, the objectionable speaker in this case (the military) is itself a government entity, but nothing in the law schools' argument suggests that they would not invoke their alleged constitutional rights when pressured to accommodate *private* speakers whose messages and practices they condemn. In short, the public law school members of FAIR are asking this Court to grant them a constitutional *right* to instill their approved viewpoint in their students, and to do so by excluding those holding contrary perspectives. Both the goal and the chosen means of the public law schools are profoundly antithetical to the traditional understanding of the First Amendment's purpose.

It is not hard to imagine how public educational institutions – and perhaps other government agencies – might use their newfound constitutional "right" as a way to limit dissent, and to do so in the name of "inculcating values" in their students. Revisiting historical controversies suggests all too plainly how this new "right" would be employed if recognized by this Court.

In 1969, at the height of the controversy over American military involvement in Vietnam, students at Central Connecticut State College, a public institution, formed a local chapter of Students for a Democratic Society (SDS). *See Healy v. James*, 408 U.S. 169, 172 (1972). The president of the state college denied their request for official recognition as a campus organization in part on the ground that the group's "philosophy was antithetical to the school's policies." *Id.* at 175. The president declared that access to student group benefits "should not be granted to any group that 'openly repudiates' the College's dedication to academic freedom." *Id.* at 175-76. This Court rightly held that the college's decision violated the students' First Amendment rights. *Id.* at 194. *See also Hudson v. Harris*, 478 F.2d 244 (10th Cir. 1973) (anti-war group denied recognition by state college stated First Amendment claim for relief).

Although Central Connecticut State College offered numerous justifications for its action, at no time did it contend that the First Amendment gave it a *right* to deny recognition to the student group in order to better inculcate students in its preferred philosophy. However unthinkable such a contention might have been then, it is certainly "thinkable" today: each of FAIR's public law school members are claiming a First Amendment right to exclude a speaker whose practices are, in *Healy*'s words, "antithetical to the school's policies."

Decades ago, a number of public universities attempted to stifle fledgling student chapters of the American Civil Liberties Union. In the fall of 1969, a group of students at state-run Radford College in Virginia sought recognition of a campus ACLU chapter. *ACLU v. Radford College,* 315 F. Supp. 893, 894 (W.D. Va. 1970). The college required that the "purpose and practices" of student groups be consistent with "the broad

educational philosophy of Radford College." *Id.* at 894. In refusing to recognize the ACLU chapter, the faculty declared that the "role and purpose of the American Civil Liberty [sic] Union lies basically outside the scope and objectives of this tax supported educational institution." *Id.* at 898. The court held that Radford, as a state college, had violated the students' First Amendment rights. *Id.* at 899.

Suppose that Radford College possessed a First Amendment *right* to inculcate its students in its "broad educational philosophy" and its "scope and objectives" by excluding contradictory voices such as, in the eyes of Radford's 1969 faculty, the ACLU.[8] At the very minimum, the possession and assertion by Radford of such a right would have severely complicated the court's analysis of the ACLU's Free Speech Clause claims. If this Court were to recognize a free speech right of public educational institutions to exclude unwanted speakers, how will the lower courts adjudicate the free speech claims asserted *against* public institutions *by* those unwanted speakers? Whose First Amendment interests should be elevated, and whose should be subordinated?

[8] In the instant case, interestingly, the ACLU submitted a brief *amicus curiae* to the Court of Appeals supporting FAIR and the other plaintiffs. The ACLU brief failed to distinguish between FAIR's private and public law school members, thereby tacitly advocating the extension of First Amendment rights to government-run law schools. The ACLU's *amicus* brief filed in the Third Circuit can be found at http://www.law.georgetown.edu/solomon/Documents/GibbonsDelDeoACLU.pdf (last visited July 15, 2005). It is difficult to imagine that the ACLU would have supported the notion that Radford and the other universities that denied it recognition decades ago had a *constitutional right* to do so. *See also University of Southern Miss. Chapter of the Miss. Civil Liberties Union v. University of So. Miss.*, 452 F.2d 564 (5th Cir. 1971).

Further, granting public educational institutions a free speech right to convey their preferred messages by excluding disfavored outsiders could destabilize the well-settled law regarding the access of religious speakers to public fora. For decades, countless schools denied religious groups equal access to meeting space on the ground that permitting such access would violate the Establishment Clause. Typically, schools argued that granting religious speakers access would send an unwanted message: that the school endorsed or favored the religious group. They claimed that the receipt by the community of this unintended message – one contrary to the school's desired message of neutrality – resulted in an Establishment Clause violation. For example, in 1977, the University of Missouri at Kansas City denied a student religious group called Cornerstone access to meeting space on the ground that such access would cause students to believe that the university endorsed religion. *See Widmar v. Vincent*, 454 U.S. 263, 274, n. 14 (1981). Similarly, in 1985, administrators at Westside High School in Omaha denied Bridget Mergens' request for meeting space for a Christian club. *See Board of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226, 232 (1990). They feared equal treatment would send a message of official endorsement of religion. *Id.* at 247. *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1990) (discussing fear that "the community would think that the District was endorsing religion"); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 841-42 (1995) (discussing "concern that [a student newspaper's] religious orientation would be attributed to the University"). Nevertheless, this Court consistently and repeatedly rejected governments' Establishment Clause justifications for denying religious speakers access to speech fora. *See generally Widmar v. Vincent*, 454 U.S. 263; *Board of Educ. of Westside Comm. Schs. v. Mergens*, 496 U.S. 226; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508

U.S. 384; *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819; *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

If this Court were to confer First Amendment rights upon FAIR's public law school members, one can imagine that certain public schools will deny some or all religious speakers – especially unpopular or controversial ones – access to speech fora on the ground that such speakers contradict or undermine some message the school intends to communicate to its students. For example, many public schools today attempt to instill in their students a spirit of tolerance and acceptance of various differences, including religious ones. Many religious speakers, understandably, contend that their own religious beliefs are true and that contrary religious beliefs are false. Although such a perspective is not necessarily incompatible with "tolerance" (rightly understood), it is not difficult to foresee a public school administrator concluding that such religious speech undermines the message of "tolerance and acceptance" the school communicates and hopes its students will embrace. Instead of invoking the Establishment Clause to justify the exclusion of the religious speaker, the school could instead raise its *own* free speech rights, setting up an unmanageable conflict between competing constitutional claims.

There is great irony in the public law schools' contention that they have a free speech right to protect the purity of their perspective on homosexuality by excluding military recruiters. In the 1970s and 1980s, it was the Free Speech Clause upon which homosexual student groups relied in successfully challenging public universities' refusal to recognize them. For example, a group called Gay Student Services filed a First Amendment lawsuit in 1976 against Texas A&M University, successfully challenging the school's refusal to recognize the

group. *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984). Texas A&M denied recognition on the ground that the purposes of the group were "not consistent with the philosophy and goals that have been developed for the creation and existence of Texas A&M University." *Id.* at 1320. *See also Gay Students Org. of the Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976) (Virginia Commonwealth University); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (University of Arkansas); *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558 (M.D. Ala. 1996) (University of South Alabama).

Over twenty years later, public law schools are claiming a constitutional *right* to exclude organizations whose purposes are "not consistent with the philosophy and goals" of the law schools. To be sure, many of the "philosophies and goals" of American higher education have changed in two decades. However, the wisdom of conferring a constitutional *right* upon public universities to protect their own preferred messages by excluding unpopular speakers has not: it was a bad idea then, and it is a bad idea now.

The "hot button" student groups on college campuses are no longer the ACLU, anti-war activists, or gay rights proponents. Instead, the vast majority of contemporary controversies center upon religious groups that take religion and moral conduct into account in selecting their leaders and voting members. Consistent with their treatment of military recruiters, many law schools have denied or revoked the recognition of religious student groups, on the ground that their leadership policies constitute religious and sexual orientation

"discrimination."[9] Law school chapters of the Christian Legal Society (CLS), a 44 year-old association of Christian lawyers, judges, law professors, and law students, have endured a relentless assault by law schools intolerant of their unpopular perspective on the morality of homosexual conduct or the relevance of religious belief. Just within the last three years, public university officials have threatened, de-recognized, or denied benefits to CLS law student chapters at Ohio State University, Washburn University, Arizona State University, University of California Hastings College of Law, the University of Iowa, the University of Toledo, and Southern Illinois University. Other religious student groups at the University of North Carolina, Penn State University, the University of Oklahoma, the University of North Dakota, and the University of Minnesota have confronted similar problems in the recent past.

Certain of these universities, including Ohio State, Washburn, Penn State, Toledo, and Minnesota, wisely amended their non-discrimination policies to respect the religious freedom rights of religious student groups, either before or shortly after litigation ensued. *See, e.g., Christian Legal Society Chapter of the Ohio State University v. Holbrook*, S.D. Ohio No. 2:04-cv-197; *Maranatha Christian Fellowship v. Regents of the University of Minnesota System*, D. Minn. No. 0:03-cv-05618; *Christian Legal Society Chapter of Washburn University School of Law v. Farley*, D. Kan. No. 5:04-cv-04120; *DiscipleMakers v. Spanier*, M.D. Pa. No. 4:04-cv-02229 (Penn State University); *Christian Legal Society Chapter of the University of Toledo v. Johnson*, N.D. Ohio No. 3:05-cv-07126. However, a number of universities have steadfastly refused to accommodate these groups' sincere religious beliefs and exercise, and are vigorously contesting the student groups' efforts to vindicate their constitutional rights in court. *See Christian Legal Society Chapter at Arizona State University College of Law v. Crow*, D. Ariz. No. 2:04-cv-02572; *Christian Legal Society Chapter of University of California, Hastings College of Law v. Kane*, N.D. Cal. No. 3:04-cv-04484; *Alpha Iota Omega Christian Fraternity v. Moeser*, M.D.N.C. No. 1:04-cv-00765 (University of North Carolina); *Christian Legal Society Chapter at Southern Illinois University School of Law v. Walker*, S.D. Ill. No. 4:05-cv-04070.

[9] The *amici* reject the contention that religious student groups commit "discrimination" by taking religious belief and conduct into account in choosing their leadership and voting membership. Properly understood, "discrimination" is the invidious reliance upon irrelevant characteristics. Religious groups' preservation of their religious character is not invidious; religious belief and moral conduct are not irrelevant. *Cf.* 42 U.S.C. §2000e(j) (exempting religious employers from Title VII's ban on religious discrimination in employment).

In each of these cases, unpopular dissenters are challenging the prevailing orthodoxies on their campuses. That they invoke ancient creeds and traditional mores instead of avant garde ideas matters not. The pivotal reality is that they disagree with the majority of their peers and, more importantly, those who wield power on campus. The notion that the First Amendment should be a weapon in the hands of the powerful to stamp out the last remaining vestiges of dissent is nothing short of repugnant.

By its own admission, FAIR's law school members are intent on convincing each and every one of its students that participation in homosexual conduct is morally acceptable. They concede that one purpose of their non-discrimination policies is to pronounce values "that law faculty hope students will internalize" and that students "will follow in their law

practices and lives as community leaders." Second Amended Complaint, ¶ 24. *See also id.*, ¶ 1 (the "message" sent by discriminatory recruiters "violates the core values they inculcate in their students"); ¶ 7(g) (FAIR member school "believes that the assistance it provides to the military undermines the message it is trying to inculcate in its students"); ¶ 8(b) (non-discrimination policies "forcefully send a vital message of the values embraced by SALT members and SALT members' law schools to students"); ¶ 10 (policies are "directed at inculcating values"); ¶ 22 (a "message of diversity and tolerance is communicated by law schools" through non-discrimination policies"); ¶ 24 (non-discrimination policy "has substantive pedagogical value by pronouncing values that students do not necessarily learn from casebooks and lectures"); ¶ 29 (application of non-discrimination policy to military is "entirely expressive in purpose and effect"). Their policies are less about protecting homosexual students from discrimination than about instilling this message.

Yet, they do not stop there. They inculcate this message by communicating a further message: that any *disapproval* of homosexual conduct is *itself* immoral. Moreover, their response to such disapproval – a competing message – is to suppress and stifle it. In their opposition to the petition for a writ of certiorari, FAIR stated, "[t]he lesson the law school wants to inculcate is that employers who discriminate should *not* be treated the same as those who do not." Cert. Opp. at 17. *See also* Second Amended Complaint ¶ 1 (message sent by discriminatory employers is one "they abhor"); ¶ 2 (through their non-discrimination policies, law schools "make a statement that invidious discrimination is a moral wrong and impart that view to their students"); ¶ 3 (consideration of sexual orientation in employment decisions is, "in the estimation of law faculties nationwide, invidiously discriminatory"); ¶ 21 ("Judgments based solely on … creed,

… religion, … or sexual orientation have no place in the law school environment").

FAIR contends that the government's efforts to insure military recruiters' access to campus are *not* about filling JAG spots with the best lawyers, but instead a response to a perceived "slap in the face." FAIR's complaint about the military's alleged abuse of its power for cultural, political, and ideological reasons rings hollow, given that its law school members are doing *precisely* the same thing to their CLS chapters. FAIR claims that "the only battle Congress and the Armed Forces are waging in this instance is a *Kulturkampf*." Cert. Opp. at 28. This contention is nothing but a stone thrown from a glass house; a *Kulturkampf* is the only battle the law schools are waging against their CLS chapters.

The effort of law schools to produce graduates with a uniform viewpoint on the morality of homosexual conduct is particularly troubling given the thoroughly unresolved character of the national debate regarding homosexuality. Although the plaintiffs are convinced that sexual orientation discrimination is as morally repugnant as race discrimination, huge numbers of their fellow Americans disagree. A wealth of evidence reveals that the law schools' position on homosexuality is deeply controversial. For example, neither the federal government nor 34 states have enacted police power statutes forbidding sexual orientation discrimination in employment.[10] The federal government enacted the Defense of

---

[10] *See* 42 U.S.C. § 2000e-2(a)(1) ("sexual orientation" absent from list of protected characteristics); Human Rights Campaign, "Statewide Anti-Discrimination Laws & Policies, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821 (last visited July 15, 2005); Lambda Legal Defense and Education

Marriage Act, Pub. L. 104-199, 100 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 (1997) and at 28 U.S.C. § 1738C (1997), and the vast majority of states have either enacted similar legislation or amended their constitutions to preserve the traditional definition of marriage.[11]

Public law schools – in their capacity as law schools – have not only "chosen sides" in this ongoing battle, but are using their power to marginalize dissenters. Contrary to the public law school FAIR members' contention, the First Amendment *prohibits* rather than *protects* their misuse of power.

Fund, "Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation," http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217 (last visited July 15, 2005).

[11] *See* http://www.domawatch.org/stateissues/index.html (last visited July 15, 2005); Human Rights Campaign, "Statewide Marriage Law," http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449 (last visited July 15, 2005); Lambda Legal, "State Laws Banning Marriage Between Same-Sex Couples," http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1254 (last visited July 15, 2005).

CONCLUSION

For the reasons set forth herein, the Court's *amici* respectfully submit that the decision of the Third Circuit Court of Appeals should be reversed, and the case remanded for consideration of the application of the First Amendment, if any, to public as well as private institutions of higher education subject to the Solomon Amendment.

Respectfully submitted,

Gregory S. Baylor
(Counsel of Record)
CENTER FOR LAW
& RELIGIOUS FREEDOM OF THE
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Ln., Ste. 222
Annandale, Virginia 22003
Tel.: (703) 642-1070

Counsel for Amici Curiae

July 18, 2005